Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

QANTAS AIRWAYS, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MURRAY GARTNER
Counsel for Respondent
Qantas Airways, Ltd.
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Of Counsel:
EDWARD A. BRILL

BEST AVAILABLE COPY

Counterstatement of the Question Presented

Should this Court review findings of fact on the basis of which the district court concluded that Qantas had fulfilled its duty under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, to exert every reasonable effort to make and maintain agreements, when the court below, after detailed examination, held those findings were not clearly erroneous?

TABLE OF CONTENTS

	PAGE
Counterstatement of the Question Presented	i
Table of Authorities	iii
Statement of the Case	2
Reasons Why the Writ Should Not Be Granted	5
I. The Petition Presents Only Questions of Fact, Which Are Inappropriate For Review By This Court	5
II. The Courts Below Rejected the IAM's Portrayal of Qantas' "Approach to the Negotiations"	8
The Two Courts' Findings:	
A. Qantas Did Not Take The Position That It Would Not Bargain About The Decision To Contract Out The Work	8
B. Qantas Did Not Take Steps To Limit Its Flexibility In Negotiations	10
C. Qantas Did Not Fail To Provide The Union With Relevant Information	10
Conclusion	12

TABLE OF AUTHORITIES

Cases

PAGE

Berenyi v. Immigration Director, 385 U.S. 630 (1967) .. 6

Chicago and North Western Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971) 7

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) ... 6

Rogers v. Lodge, 458 U.S. 271 (1982) 6

Superintendent, Massachusetts Correctional Institution v. Hill, 105 S. Ct. 2768 (U.S. 1985) 6

United States v. Johnston, 268 U.S. 220 (1925) 6

Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937) 7

Statutes

Railway Labor Act, 45 U.S.C. §§ 151-188 ..... *passim*

Section 2, First; 45 U.S.C. § 152, First 2, 6, 7, 8

Other Authorities

Federal Rules of Civil Procedure, Rule 41(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

QANTAS AIRWAYS, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Qantas Airways, Ltd.[1] opposes the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued in this case on September 6, 1985.

---

1 In accordance with the requirements of Rule 28.1, Qantas Airways, Ltd. states that it is a corporation established under the laws of the State of Queensland, Commonwealth of Australia. All of the presently issued and outstanding capital shares of Qantas are beneficially owned by the Australian Government. Qantas has an ownership interest in the following Australian companies (excluding wholly-owned subsidiaries): Fiji Resorts, Ltd; Travel Industries Automated Systems Proprietary, Ltd.

Statement of the Case

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") brought this action against Qantas Airways, Ltd. ("Qantas") in February 1983, alleging that Qantas, in negotiations with the IAM which extended for almost a year, had not fulfilled its obligation to bargain as required by Section 2, First of the Railway Labor Act ("RLA"). The IAM contended that Qantas had made an irrevocable decision to contract out its airport work before the negotiations began, and consequently was unwilling to bargain with the IAM over that decision as required by the RLA.

The district court dismissed the IAM's complaint, under F.R.Civ.P. Rule 41(b), at the close of plaintiff's case. In detailed and specific findings of fact, the district court found that there was no evidence to sustain the IAM's claim of an irrevocable decision to contract out the work, and that Qantas, throughout the negotiations, invited and would have considered alternative proposals, which the Union never made, to achieve a comparable reduction in airport operating costs. The court also specifically found against petitioner's subsidiary contentions pressed here, that Qantas had taken steps to lock itself into its proposal, and had failed to provide the union with relevant information. On appeal, the Court of Appeals for the Ninth Circuit "reviewed in detail the briefs of counsel and the record of the proceedings below" (Pet. App., p. 27), held that "the District Court's findings of fact are not clearly erroneous" (Pet. App., p. 28) and affirmed the judgment of the trial court.

The facts found by the district court, and affirmed by the court of appeals, can be summarized as follows:

1. In February, 1982, Qantas proposed to the IAM that the existing agreements, which covered airport and non-airport employees, be changed to permit contracting out of airport work at San Francisco and Honolulu. Qantas explained to the

IAM that to do that work with its own employees, even taking into consideration the revenues earned from handling other carriers, cost Qantas over $2,500,000 a year more than what it would cost to get that work done by outside contractors, and that if the other carriers cancelled their handling contracts, as several carriers had done in the past, the excess cost to Qantas would be $5,000,000 per year (FF 11, 12, 21, 25).[2] Qantas provided the Union with a detailed financial explanation of the economic and business reasons for its proposal to contract out the airport work, and offered to answer any questions about the economics of the Company's proposal; the Company provided all of the information requested by the Union (FF 31, 32, 33).

2. From the very start of the negotiations Qantas told the Union that its contracting-out proposals were "negotiable" (FF 26). Throughout the negotiations, the Company repeatedly stated at the bargaining table that it was willing to listen to cost-saving alternatives to contracting out (FF 55).

3. During the entire period of direct negotiation and statutory mediation, however, from March 1982 through January 6, 1983, the IAM made it clear to the Company that it was adamantly opposed to the entire concept of contracting out of work and refused even to discuss Qantas' proposals; during the same time, the Union "did not introduce a single cost-saving alternative proposal to contracting-out" (FF 42, 65, 86).

4. The final 30 day cooling-off period under the RLA began on January 7, 1983. Three days later, Qantas suggested that the parties resume negotiation in a continuing effort to reach agreements, and stated that it remained willing to consider any alternative proposals by the Union with respect to the airport work, which would result in cost savings comparable to what

---

2 References are to the district court's Findings of Fact ("FF") and Conclusions of Law ("COL"), reproduced at pages 1-25 of the Appendix to the Petition.

would be achieved by contracting-out (FF 64, 67). On January 19, the Union, for the first time, made an alternative proposal, which it stated would save the Company over $2 million annually. (FF 71). On the following day, the Company reported to the Union that its calculation indicated that the Union's proposal would save only approximately $500,000, and asked the Union for further explanation. The Union, instead, withdrew its proposal, and refused to discuss it further (FF 73).

5. While the NMB conducted additional non-statutory mediation sessions from February 1 through February 4, 1983, the Union did not resubmit its January 19 proposal, did not provide any further detail or explanation of that proposal, and did not make any other proposals (FF 74, 77). On February 6, 1983, after the cooling-off period had expired, Qantas implemented its proposal to contract out the airport work in Honolulu and San Francisco (FF 78).

6. The district court specifically found that "Qantas was willing to negotiate with the Union on the contracting out decision *and* on its effects" (FF 79, emphasis in original). Noting that the Company negotiating team had been instructed to take a "firm stance" in the negotiations, the court found that "its instructions made clear that the Company was flexible and would modify its position should that become desirable in the course of negotiations" (*id.*), and that "[t]he Company negotiating team was in fact flexible" (*id.*). In two fundamental findings, the court conclusively rejected plaintiff's contention that Qantas had refused, or would have refused, to bargain over the decision to contract out the airport work, because there was no evidence to support that contention:

> "83. There is no evidence that either before or after the commencement of negotiations, but prior to February 6, 1983, Qantas made an irrevocable decision to contract out all of its airport handling work in San Francisco and Honolulu, or that Qantas refused to bargain over the decision to contract out the work, or that Qantas engaged

in 'surface bargaining.' Nor is there evidence that the Company deliberately misled the Union as to the existence of economically equivalent alternatives to contracting-out for the purpose of discouraging meaningful negotiations.

* * *

85. Plaintiff has failed to show that if the Union had presented the Company with concrete alternative cost-saving proposals, the Company would have refused to consider them. The Company was interested in reducing its costs and would have considered any proposal which would have accomplished that goal, particularly if it would have avoided the risk of a strike. The Union's efforts were concentrated on trying to get the Company to submit alternative proposals for the Union to consider, rather than on making such proposals for the Company to consider."

Reasons Why the Writ Should Not Be Granted

I. The Petition Presents Only Questions Of Fact, Which Are Inappropriate For Review By This Court.

Petitioner's statement of the question it seeks to have this Court review, confusing fact and law, obscures its basic thrust, that this Court should review findings of fact of the district court which the Court of Appeals, after careful review, held were not clearly erroneous. Petitioner, with unjustified alarm, now claims that the Court of Appeals "decided a federal question in a way that will impact industrial relations" (Pet. p. 4), and that it "endorsed an approach to collective bargaining negotiations which violates the objectives of the RLA" and "completely undermines the law governing labor relations in the railway and airline industries" (*id.*).

In the court below, however, petitioner asserted only that ten findings on which the district court based its conclusion that Qantas had fulfilled its bargaining obligations were clearly

erroneous, not that those findings did not support the conclusion that there was nothing legally wrong with Qantas' "approach to the negotiations". In the face of the Court of Appeals' careful determination that those findings were not clearly erroneous, petitioner here merely points to four segments of evidence which it argues should have resulted in three different findings; it does not review the much greater body of evidence which justified both courts below in making and sustaining the three findings which are now contested. Petitioner's attempt to make an important "federal question" out of its disagreement with findings of fact must fail, since there is no federal question in the light of the determination by the court below that the findings were not clearly erroneous.

It is well established that, absent unusual circumstances, this Court will not accept a case for review where only questions of evidence and factual findings are involved. *See, e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925), (Court does not "grant a certiorari to review evidence and discuss specific facts"), *cited in Superintendent, Massachusetts Correctional Institution* v. *Hill*, 105 S.Ct. 2768, 2777 (1985) (Stevens, J., concurring in part and dissenting in part). Particularly where the findings of fact made by the district court received the concurrence of the Court of Appeals, there is almost never a reason for this Court to review the decisions below. *See, e.g., Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), *quoted in Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner never disputed below—and does not dispute here—the legal standard applied by the district court in evaluating whether Qantas fulfilled its duty under RLA Section 2, First to exert every reasonable effort to make agreements

concerning rates of pay, rules and working conditions, as follows:

> "An employer who wishes to contract out is under a duty imposed by Section 152, First to indicate its desire to contract out and stand ready to listen to and consider the Union's opposing arguments and counterproposals, if any" (COL 5, Pet. App. 24).

Nor was there any dispute that, under the Railway Labor Act, Qantas was free to persist in its proposal to contract out the work—particularly in the absence of any serious alternative proffered by the Union—and that the duty to bargain in good faith does not require either party to surrender a proposal, on a mandatory subject of bargaining, which is important to it (COL 6, Pet. App. 24). *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 547-48 (1937).[3] The lower courts found—as a matter of fact—that Qantas fully satisfied this uncontested legal standard. It notified the Union of its proposal to contract out, it invited alternative proposals, and would have considered any proposals which the Union made, as it did consider the one proposal which the Union belatedly made and immediately withdrew. In short, "Qantas was willing to negotiate with the Union on the contracting out decision *and* on its effects" (FF 79).

Since the case does not present any important question of law, and turns solely on the particular facts found by the courts below, review by this Court is clearly unwarranted.

---

3 When this Court held the obligation imposed by Section 2, First to be judicially enforceable, it did not construe that statutory provision to mean more than "avoidance of 'bad faith' " in the sense of going through the motions with a "desire not to reach agreement" *Chicago and North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 578 (1971).

In fact, this Court cautioned that in any possible determination of violation of Section 2, First, "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement', for doing so risks infringement of strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements." 402 U.S. at 579, n. 11.

II. The Courts Below Rejected the IAM's Portrayal of Qantas' "Approach to the Negotiations".

Instead of accepting and addressing the facts as found below, petitioner relies on what it refers to as "strong evidence" (Pet., p. 11) that "Qantas' approach to the negotiations" (*id.*) violated its duty under RLA Section 2, First, in three respects. In each instance, Petitioner relies on particular pieces of evidence, or portions of findings, taken out of context, and ignores the specific and dispositive findings concurred in by the two lower courts.

The Two Courts' Findings:

A. Qantas Did Not Take The Position That It Would Not Bargain About The Decision To Contract Out The Work. The IAM asserts that "Qantas' approach to the negotiations was to bargain only about the terms of the severance package which might be made available to employees and that there would not be any meaningful negotiations over the *decision* to contract out" (Pet. p. 6, emphasis in original), and that Qantas took the position that its intent to contract out bargaining unit work was "non-negotiable" (Pet. pp. 4, 11, 12). These factual contentions are completely contrary to the findings made by the lower courts. (See pp. 3-5, above.) Petitioner simply persists in setting forth its own twice-rejected view of the evidence, focusing on two isolated statements made in the course of nearly a year of negotiation and mediation, and ignoring the wealth of evidence, documentary and testimonial, which persuaded the district court that Qantas' contracting-out proposals were "negotiable", that "the Company was flexible", and that the "Company negotiating team was in fact flexible" (FF 26, 79).

1. Qantas Deputy Chief Executive Ronald Yates met with two union officials on September 13, 1982, in a meeting requested by the Union and held apart from the regular negotiation sessions. The union officials who attended testified

that, although they had no proposal to make to the Company after nearly six months of fruitless negotiations, they hoped to persuade Yates to abandon the contracting-out proposal. The Court found that "Yates was aware that the Union's purpose in asking to meet with him was to determine whether the Company's contracting-out proposal was a 'hard' or 'soft' proposal" and that "he therefore told the Union representatives the Company's position on contracting-out to save excess costs was 'non-negotiable' ". (FF 53, 54). As the occasion and context of that statement make clear, Yates said that the Company's proposal was "non-negotiable", not in the sense that the Company would not listen to whatever alternatives the Union had to propose, but that it was a "hard" proposal which the Company would not withdraw in the absence of alternatives. His statement was understood in just that sense by the Union representative (FF 54). Indeed, as the court specifically found, both before and after the meeting of September 13, the Company repeatedly stated at the bargaining table that it would be willing to listen to cost savings alternatives to contracting out (FF 55).

2. Contrary to Appellant's argument that the October 29, 1982 memorandum to line managers should be read as saying that Qantas would negotiate only about the "effects" of contracting-out, that memorandum, in fact, was a status report of what was on the table in the United States negotiations at that time, in contrast to what the Company was offering its employees in Australia. By September 23, 1982, the Union negotiators still had made no cost-reduction proposal (FF 42, 53, 65), and the chief Union negotiator told the mediator that he wanted a recess to seek authority to negotiate on the Company offer for an agreement on contracting-out (FF 57). Qantas therefore told its managers that the Company and mediator were still awaiting an answer and that, if the Union got that authority, negotiations would continue on that subject, since that was the only proposal on the table. The status report cannot be construed, nor was it by the courts below, as a statement that Qantas was refusing, or had ever refused, to

bargain on any other proposal the Union might have made, but which it had, up to that point, adamantly refused to make.

B. Qantas Did Not Take Steps To Limit Its Flexiblity In Negotiations. The IAM also asserts that "Qantas took steps that would economically make it difficult to alter its proposal" (Pet., p. 7), and that it "cemented that position by making it economically unfeasible to seriously consider other alternatives" (Pet., p. 11). This contention is based on the cancellation, by Singapore Airlines, of its handling contract with Qantas, effective October 1, 1982; the IAM says that "[t]he obvious result was to place Qantas in a position where a major source of its revenue was eliminated, thus limiting its flexibility in its negotiations with the IAM . . ." (Pet., p. 8). Again, the IAM simply overlooks the findings made by the district court, which thoroughly rejected the IAM's claim that Qantas took action to induce Singapore to cancel its contract. On the contrary, the court specifically found that "Qantas did not induce Singapore Airlines to cancel its contract with Qantas, thereby limiting Qantas' flexibility in negotiations" (FF 94). It found that Singapore acted independently of Qantas and in its own interests in investigating and making other handling agreements (FF 95, 99), and that "[w]hatever the ultimate resolution of the IAM negotiations, it was clearly in Qantas' economic self-interest to retain Singapore's handling as long as possible." (FF 100)

C. Qantas Did Not Fail To Provide The Union With Relevant Information. The IAM's final contention is that Qantas failed to provide the Union with certain financial information. It asserts that the district court's finding to the contrary that the IAM "was provided with all information requested" (FF 33) was "clearly erroneous." (Pet., p. 8) The "Optimum Staffing" Study, however, which the IAM says it was denied, was an internal company study of the possible cost-savings under the most favorable staffing patterns, assuming unrestricted use of part-time employees and cross-utilization of

employees, not possible under the existing agreements. The conclusion of the study was that "optimum staffing" was incapable of producing the desired savings, since it would cost the Company $3 million more annually to do the work with "optimum staffing", than it would cost to contract out. (FF 36). The evidence was clear that the Union did not ask for the Optimum Staffing survey, since it had somehow already improperly obtained it, but only asked why the Company was making such a survey when it said it wanted to contract out the work.

The Company was not concealing any financial information to insure that the IAM would not be aware of economically desirable alternatives to contracting out, as the petitioner suggests; on the contrary, the Company did not want the union to be misled into the belief that "optimum staffing" was the Company's optimum objective, since it was not even a cost-saving alternative. Indeed, the Company informed the Union on April 1 that the Union had all the necessary financial and manpower information to conduct its own study on "optimum" staffing, but that Qantas could still get the work done for less by contracting out. (FF 37). There is no cause for this Court to review the finding concurred in by two lower courts, that there was no evidence "that the Company deliberately misled the Union as to the existence of economically equivalent alternatives to contracting-out for the purpose of discouraging meaningful negotiations". (FF 83).

Conclusion

Since it raises only questions of fact without any showing that the court below was not justified in holding that the district court's findings were not clearly erroneous, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1986

Respectfully submitted,

MURRAY GARTNER
Counsel for Respondent
Qantas Airways, Ltd.
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Of Counsel:

EDWARD A. BRILL